[Cite as *State v. Howerton*, 2021-Ohio-913.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 20CA2
vs.	:	
JONATHAN HOWERTON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

B. Luke Styer, Huntington, West Virginia, for appellant.

Brigham Anderson, Lawrence County Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 3-10-21
ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Municipal Court judgment of conviction and sentence. After the trial court denied a motion to dismiss based on speedy trial grounds, Jonathan Howerton, defendant below and appellant herein, pleaded no contest to, inter alia, a first-time driving under the influence violation. Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION AND OTHERWISE COMMITTED REVERSIBLE ERROR IN ITS NOVEMBER 15, 2019 JUDGMENT ENTRY OVERRULING THE APPELLANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS, THUS VIOLATING THE APPELLANT'S RIGHT TO SPEEDY TRIAL."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION AND OTHERWISE COMMITTED REVERSIBLE ERROR IN GRANTING A CONTINUANCE TO THE STATE OF OHIO OF THE TRIAL SCHEDULED NOVEMBER 25, 2019, THUS VIOLATING THE APPELLANT'S RIGHT TO SPEEDY TRIAL."

{¶ 2} On July 26, 2019, Ohio State Highway Patrol Trooper B.J. Barr charged appellant with OVI in violation of R.C. 4511.19(A)(1)(a), failure to wear a seat belt in violation of R.C. 4513.263(B)(1), failure to drive in marked lanes in violation of R.C. 4511.33, and distracted driving in violation of R.C. 4511.991.

{¶ 3} On August 2, 2019, appellant appeared in court and pleaded not guilty to the charges. The trial court also appointed counsel and scheduled a pretrial hearing for October 18, some 84 days after appellant's arrest. Apparently, the court scheduled the pretrial on a date when appellant's urinalysis test results should be completed and available for inspection.

{¶ 4} At the October 18 pretrial hearing, the trial court continued the case. Apparently, an acting judge inadvertently scheduled the trial for October 25, 2019, one day beyond the ninety day statutory speedy trial window. It also appears that no explicit speedy trial waiver occurred.

{¶ 5} On October 25, 2019, defense counsel made an oral motion to dismiss the charges based on a speedy trial violation. At the hearing, the trial court took the matter under advisement and noted that the "defendant is not waiving any time up to the point of making the motion, but after the motion * * * that time will not count as against speedy trial."

{¶ 6} On November 15, 2019, the trial court issued an entry that denied the motion and provides, "The court finds that the defendant cannot agree to the setting of a trial date one day outside of rule without objection and then raise speedy trial grounds when there were other available

dates the court could have set trial."

{¶ 7} After a number of other delays, on December 30, 2019 appellant pleaded no contest to the charges. The trial court sentenced appellant as a first-time OVI offender, but stayed his sentence pending appeal. This appeal followed.

I.

{¶ 8} In his first assignment of error, appellant asserts that the trial court should have dismissed the charges due to a speedy trial violation.

{¶ 9} A defendant's right to a speedy trial arises from the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 14; *Barker v. Wingo,* 407 U.S. 514, 521, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). R.C. 2945.71 incorporates this guarantee, which provides specific statutory time limits within which a person must be brought to trial. *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 10. The prosecution and trial courts have a mandatory duty to try an accused within the statute's prescribed time frame. *State v. Singer*, 50 Ohio St.2d 103, 105, 362 N.E.2d 1216 (1977); *see also State v. Cutcher*, 56 Ohio St.2d 383, 384, 384 N.E.2d 275 (1978).

{¶ 10} Ohio's speedy trial statutes provide that, if a defendant's trial is not held within the time specified in R.C. 2945.71 and 2945.72, a court must discharge the defendant upon motion made at, or before, the start of trial. R.C. 2945.73(B). Additionally, speedy trial statutes must be strictly construed against the state. *Brecksville v. Cook,* 75 Ohio St.3d 53, 57, 661 N.E.2d 706 (1996).

{¶ 11} Generally, appellate review of a trial court's decision to deny a motion to dismiss based on statutory speedy trial grounds presents a mixed question of law and fact. *State v. Spencer*,

2017-Ohio-456, 84 N.E.3d 106, ¶ 16 (4th Dist.); *State v. Brooks,* 2018-Ohio-2210, 114 N.E.3d 220, ¶ 21 (4th Dist.). An appellate court will accept a trial court's findings of fact if supported by competent, credible evidence, but the appellate court will independently review a trial court's application of the law to the facts. *Spencer* at ¶ 16.

{¶ 12} When a defendant requests discharge on speedy trial grounds and demonstrates that a trial did not occur within the speedy trial time limits, the defendant has made a prima facie case for discharge. *State v. Camelin,* 4th Dist. Ross No. 18CA3642, 2019-Ohio-1055, ¶ 11; *State v. Smith*, 4th Dist. Lawrence No. 16CA10, 2017-Ohio-7864, ¶ 21; *State v. Cottrell,* 4th Dist. Ross Nos. 11CA3241 & 11CA3242, 2012-Ohio-4583, ¶ 10, *State v. Kirst*, 173 Ohio App.3d 158, 2007-Ohio-4773, 877 N.E.2d 747, ¶ 22 (11th Dist.). The prosecution then bears the burden to show that actions or events chargeable to the accused under R.C. 2945.72 sufficiently extended the time to bring the defendant to trial. *Smith* at ¶ 21, citing *State v. Anderson*, 4th Dist. Scioto No. 15CA3696, 2016-Ohio-7252, ¶ 19.

{¶ 13} In the case sub judice, the officer arrested appellant on July 26, 2019. Because the most serious charge against appellant is a first-degree misdemeanor, R.C. 2945.71(B)(2) required the state to bring appellant to trial within 90 days, or October 24, 2019. Because the trial court did not try appellant's case on or before October 24, 2019, appellant made a prima facie showing that the state failed to bring him to trial within the allotted 90 days. The burden then shifted to the state to demonstrate that either a tolling event or other extension of the statutory time limit occurred. *State v. Butcher*, 27 Ohio St.3d 28, 500 N.E.2d 1368 (1986); *Smith* at ¶ 21.

{¶ 14} R.C. 2945.72 provides that the time to bring an accused to trial may be extended by "(D) [a]ny period of delay occasioned by the neglect or improper act of the accused; (E) [a]ny period

of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused," and "(H) [t]he period of any continuance granted on the accused's own motion." *Ramey* at ¶ 24. Once again, the prosecution bears the burden to show that actions or events chargeable to the defendant have tolled sufficient time so that the defendant is tried within the speedy-trial period. *State v. Camelin, supra,* at ¶ 13, citing *State v. Staffin*, 4th Dist. Ross No. 07CA2967, 2008-Ohio-338, ¶ 8, *State v. Whitt*, 4th Dist. Scioto No. 04CA2962, 2005-Ohio-5154, ¶ 16.

{¶ 15} Appellee contends that "the reason for the delay of 77 days between the arraignment and the first pre trial was because of Defendant's desire to obtain the urine screen results before deciding how to respond to the charges. The urine results might have exonerated Defendant." Thus, appellee argues, the 77 days between appellant's arraignment and pretrial should be charged to appellant because it was "prompted by Defendant and for Defendant's benefit." Our review of the record, however, does not necessarily support appellee's claim.

{¶ 16} At the August 2, 2019 arraignment, the trial court scheduled the pretrial on October 18, 2019, 77 days from appellant's arraignment, and 84 days after his July 26, 2019 arrest. Apparently, the trial court scheduled the pretrial with the goal of having the appellant's urinalysis test results completed and the results returned from the laboratory. However, we find no request on appellant's behalf for that specific pretrial date. Thus, this 84 day time period should not be charged to appellant. Again, it does not appear from our review that appellant actually sought that particular date for a pretrial. Moreover, and most important, we find no written speedy trial waiver, explicit oral speedy trial waiver or any motion or request attributable to appellant.

{¶ 17} At the October 18 pretrial hearing, it also appears that the acting judge inadvertently

scheduled the trial on October 25, 2019, one day beyond the speedy trial time deadline. Consequently, at the October 25, 2019 scheduled trial date, appellant made an oral motion to dismiss the charges based on a speedy trial violation. The appellant asserted that he had not waived his right to a speedy trial.

{¶ 18} After review, on November 15, 2019 the trial court denied appellant's speedy trial motion. The court opined that a defendant cannot agree to set a trial date outside of rule without an objection, then raise a speedy trial objection when other dates may have been available. However, appellee argued that (1) if the trial court had set the trial for October 21, 2019, three days after the October 18 hearing, the state may not have been able to obtain the presence of its witnesses, and (2) the next available trial date was October 24, but the court set the trial on October 25. Thus, appellee claimed that appellant should be responsible for the additional delay.

{¶ 19} Generally, a criminal defendant may waive his or her speedy trial rights. *See, e.g., State v. King*, 70 Ohio St.3d 158, 637 N.E.2d 903 (1994), syllabus; *State v. O'Brien*, 34 Ohio St.3d 7, 9, 516 N.E.2d 218 (1987), citing *Barker v. Wingo*, 407 U.S. 514, 529, 92 S.Ct. 2182, 33 L.Ed.2d 101. However, "[t]o be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record." *King*, syllabus. In the case sub judice, we find no explicit waiver of appellant's speedy trial rights, or any request that would toll the speedy trial time.

{¶ 20} We find *State v. Hardy*, 2d Dist. Greene No. 2012 CA 20, 2012-Ohio-3498, instructive. Hardy did not waive in writing his right to a speedy trial, nor did the trial court make any record of defense counsel's acquiescence to the trial date. The trial court overruled Hardy's motion to dismiss and noted that, because counsel and the assignment commissioner agreed on the

new trial date, this constituted a speedy trial waiver.

{¶ 21} On appeal, the Second District stated that it is well-settled that counsel may waive the client's right to a speedy trial pursuant to R.C. 2945.71, even if the client may not be aware, or has not been informed of, the waiver. The appellate court, however, found no facts in the record to support a finding that the trial court set the new date for defense counsel's convenience. *Hardy* at ¶ 12. The court also noted that an accused's waiver of speedy trial must be in writing or made in open court on the record. *Ramey*, ¶ 18, citing *State v. King, supra*. The court concluded that, other than the notice that merely acknowledged the new trial date, nothing in the record established that Hardy, or his defense counsel, waived, or sought to waive, his speedy trial rights. Also, no evidence actually supported the conclusion that the trial court scheduled the trial beyond the speedy trial time limit for defense counsel's convenience. Thus, the *Hardy* court reversed the trial court's judgment and vacated the defendant's convictions.

{¶ 22} Similarly, in the case sub judice it appears that the trial court's acting judge inadvertently set the case for trial one day beyond the speedy trial statutory deadline. We recognize that, due to a large volume of cases, municipal courts must act quickly with scheduling matters, and that inadvertent scheduling errors sometimes occur. Apparently, the court was also aware that appellant had not waived a speedy trial when the court stated, "I don't see any * * * time waiver on this," to which counsel replied, "There has not been any." In addition, we again point out that, at the October 25 hearing, the trial court stated that the Defendant is not waiving any time up to the point of his motion to dismiss, but after the motion that time will not count against speedy trial. We do recognize, however, that the court's statement was not necessarily a concession that speedy trial time had already elapsed, but rather that appellant maintained that the had not waived time up to the

date of his motion.

{¶ 23} Similar to *Hardy,* we do not believe that the record in the case sub judice supports the view that the trial court set the trial date for defense counsel's convenience. Of course, a defense motion or request will result in a waiver of speedy trial time. However, a defendant has no duty to warn or to object to a trial date set beyond the speedy trial deadline. It is the state's duty to ensure that a defendant's trial occurs within the R.C. 2945.71 timeframe. See *State v. Michailides*, 8th Dist. Cuyahoga No. 105966, 2018-Ohio-2399 ¶34, citing *State v. Penwell,* 4th Dist. Scioto No. 831, 1994 Ohio App. LEXIS 834, and *State v. Singer*, 50 Ohio St.2d 103, 362 N.E.2d 1216 (1977).

{¶ 24} Therefore, as we discussed above, an accused's speedy trial rights waiver must be expressed in writing or made in open court on the record. *King, supra,* syllabus. Consequently, after our review in the case sub judice, we do not believe that appellant, or his counsel, explicitly waived, or sought to waive, his speedy trial rights. Thus, we do not believe that the record supports the conclusion that counsel's lack of objection to a trial date set outside of the statutory speedy trial window constitutes a speedy trial waiver.

{¶ 25} Accordingly, based upon the foregoing reasons, we sustain appellant's first assignment of error.

II.

{¶ 26} In his second assignment of error, appellant asserts that the trial court's continuance of the November 25, 2019 scheduled trial date also violated appellant's right to speedy trial. However, we believe that our resolution of appellant's first assignment of error renders this assignment of error moot. See App.R. 12(A)(1)(c). Thus, we do not address it.

{¶ 27} Accordingly, based upon the foregoing reasons, we hereby sustain appellant's first

assignment of error, reverse the trial court's judgment, vacate appellant's convictions and order appellant discharged.

JUDGMENT REVERSED,
CONVICTION VACATED AND
APPELLANT DISCHARGED.

JUDGMENT ENTRY

It is ordered that the judgment be reversed, the judgment of conviction vacated and the defendant discharged. Appellant shall recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.